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APPENDIX 3: LEAGUE CITY DEFINITIONS

Table 6 examines Nielsen ratings data in "league" and "non-league" cities for two national professional sports leagues, the NFL and the NHL. In each case, the ratings are based on a universe of 56 Nielsen DMA markets. These markets have been classified as either a league city or a non-league city for each sport. Table A1 indicates which of the 56 DMAs are considered league cities. Note that any city in Table A1 that is not indicated as a league city for a particular sport is considered a non-league city for that sport. Also note that a DMA can have more than one team of the same sport, meaning that there are fewer league cities than there are teams. For example, New York City constitutes one DMA with two NFL teams (the Giants and the Jets) and three NHL teams (the Devils, Islanders, and Rangers).

TABLE A1: LEAGUE AND NON-LEAGUE CITY DEFINITIONS

	NFL Market?	NHL Market?
Albuquerque-Santa Fe		
Atlanta	Yes	Yes
Austin		
Baltimore	Yes	
Birmingham (Ann and Tusc)		
Boston (Manchester)	Yes	Yes
Buffalo	Yes	Yes
Charlotte	Yes	
Chicago	Yes	Yes
Cincinnati	Yes	
Cleveland-Akron (Canton)	Yes	
Columbus, OH		Yes
Dallas-Ft. Worth	Yes	Yes
Dayton		
Denver	Yes	Yes
Detroit	Yes	Yes
Ft. Myers-Naples		
Greensboro-H.Point-W.Salem		
Greenvll-Spart-Ashevll-And		
Hartford & New Haven		
Houston	Yes	
Indianapolis	Yes	

Jacksonville	Yes	
Kansas City	Yes	
Knoxville		
Las Vegas		
Los Angeles		Yes
Louisville		
Memphis		
Miami-Ft. Lauderdale	Yes	Yes
Milwaukee	Yes	
Minneapolis-St. Paul	Yes	Yes
Nashville	Yes	Yes
New Orleans	Yes	
New York	Yes	Yes
Norfolk-Portsmth-Newpt Nws		
Oklahoma City		
Orlando-Daytona Bch-Melbrn		
Philadelphia	Yes	Yes
Phoenix (Prescott)	Yes	Yes
Pittsburgh	Yes	Yes
Portland, OR		
Providence-New Bedford		
Raleigh-Durham (Fayetvlle)		Yes
Richmond-Petersburg		
Sacramnto-Stkton-Modesto		
Salt Lake City		
San Antonio		
San Diego	Yes	
San Francisco-Oak-San Jose	Yes	Yes
Seattle-Tacoma	Yes	
St. Louis	Yes	Yes
Tampa-St. Pete (Sarasota)	Yes	Yes
Tulsa		
Washington, DC (Hagrstwn)	Yes	Yes
West Palm Beach-Ft. Pierce		

REDACTED VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
NFL Enterprises LLC,	)	MB Docket No. 08-214
Complainant	)	
v.	)	File No. CSR-7876-P
Comcast Cable Communications, LLC,	)	
Defendant	)	

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Chief Administrative Law Judge Richard L. Sippel

TRIAL BRIEF OF NFL ENTERPRISES LLC

Jonathan D. Blake
Gregg H. Levy
Paul W. Schmidt
Robert M. Sherman
Leah E. Pogoriler
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Counsel for NFL Enterprises LLC

April 6, 2009

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TRIAL BRIEF OF NFL ENTERPRISES LLC

INTRODUCTION AND SUMMARY

NFL Enterprises LLC ("Enterprises") seeks a determination that defendant Comcast Cable Communications, LLC ("Comcast") violated federal law[1] in two ways: (1) by illegally favoring the sports networks it owns over the unaffiliated NFL Network; and (2) by demanding a financial interest in what became the NFL Network's most valuable asset as a condition of carrying the NFL Network.

The governing law is straightforward. Congress enacted Section 616 to prevent vertically integrated cable operators like Comcast — those that have financial interests in program services — from using their market power as carriers (a) to advantage their affiliated program services or (b) to disadvantage, undermine or acquire interests in independent programmers. Congress specifically prohibited companies like Comcast from (1) discriminating

[1] Specifically, Comcast has violated Section 616 of the Communications Act of 1934, 47 U.S.C. § 536, and the implementing regulations of the Federal Communications Commission, 47 C.F.R. §§ 76.1300-76.1302 (2008).

in their award of carriage and related terms against unaffiliated companies and in favor of networks that they own; and (2) conditioning favorable network carriage on their demand for a financial interest in the network. By barring this misconduct, Congress sought to ensure competition in the video programming market and to enhance the diversity of programming available to the American public.[2]

Comcast has abused its power as the nation's largest cable operator to violate both of these prohibitions. There is no dispute over the core facts establishing discrimination: Comcast has provided the sports networks it owns, including Versus and the Golf Channel (as well as the recently launched MLB Network, in which Comcast owns a minority stake), with dramatically more favorable carriage than the punitive carriage it has imposed on the NFL Network. While Comcast has attempted to excuse this discriminatory treatment on various grounds, including price, Comcast's own conduct refutes its litigation justifications. Comcast sought to purchase the most valuable programming from the NFL Network — the eight-game package — so that it could telecast that programming on Versus and use it to build Versus (its admittedly limited-value sports channel) into a major national sports network. To this end, Comcast for these eight games, and Versus was prepared to impose substantial surcharges on other carriers to reflect the value of this programming. It was only when the NFL declined to award this eight-game package to Versus

[2] S. Rep. No. 102-92, at 24 (1991) (Enterprises Exh. 178) ("As a practical matter, it is almost impossible in the present environment to start a new cable [programming] service without surrendering equity to the owners of the monopoly cable conduits."); H.R. Rep. No. 102-628, at 41 (1992) (Enterprises Exh. 180) (observing that cable operators, which had become vertically integrated, responded to new potential competitors to the operators' programming services by either refusing carriage to their new rivals or by insisting on a financial interest in programming in exchange for carriage); 1992 Cable Act, § 2 (Findings) (finding that these anticompetitive tactics could effectively "reduc[e] the number of media voices available to consumers").

and instead placed the package on the NFL Network that Comcast discriminated against the NFL Network by tiering the NFL Network, suddenly claiming that this football content lacked any value.

There is similarly no dispute that Comcast demanded a financial interest in the NFL Network as a condition of carriage. Comcast has admitted that it fought hard to carry the eight-game package — what became the centerpiece of the NFL Network's schedule — on its affiliated channel, Versus. That license would have allowed Comcast to profit directly from the success of the NFL's programming in the same way that Comcast would profit if it owned the programming itself. Indeed, Comcast admits that it

to win these games for its affiliated network and that it threatened to punish the NFL Network with unfavorable carriage if Comcast did not receive the license it sought. When the NFL ultimately placed the games on the NFL Network and not on the competing sports network that Comcast owned, Comcast executed its threat. That is a separate violation of Section 616.

Comcast does not dispute these fundamental facts. It does not dispute the purpose of Section 616. It has attempted to dispute the harm that the NFL Network suffered from these prohibited acts, but its own witnesses readily admit the harm that networks incur when they are tiered, as Comcast did with the NFL Network here. Finally, Comcast has offered no remedy in the event that it loses on the merits; it heavily criticizes the price for fair carriage that the NFL Network has proposed, but it offers no alternative proposal for the Presiding Judge or the Commission to adopt.

Simply put, Comcast has violated Section 616, and it has undermined the public interest through these violations. To remedy this discrimination, the Presiding Judge should recommend that the Commission order Comcast to carry the NFL Network on the same

programming tier on which it carries its affiliated sports networks, including Versus and the Golf Channel, and further order Comcast to pay the fair market value of the NFL Network for that carriage.

FACTS

A. Background on Channel Carriage

This case involves the carriage decisions of Comcast regarding various networks, including the NFL Network. Comcast Cable is a multichannel video programming distributor ("MVPD"), a company that provides bundles of television channels (and sometimes other services) to television subscribers. Some MVPDs are cable companies, some provide service by satellite, and some are telephone companies. Comcast is the largest cable carrier in the country.

MVPDs like Comcast enter into licensing agreements with individual channels, or networks; these agreements allow the MVPD to make the network available to its subscribers. The MVPD then offers its subscribers a range of package choices, or tiers, that increase in price with the number of channels that they include. Thus, for example, Comcast has an expanded basic tier that reaches roughly 20 million subscribers. Customers can pay more for other tiers, including a broad digital tier referred to as D2 that serves more than 8.6 million subscribers, and an additional incremental amount for a sports tier that reaches about two million subscribers.

Most networks derive two types of revenue: the licensing revenue they obtain from the MVPDs who carry their networks, which is often paid on a per-subscriber basis; and advertising revenue earned from companies who pay to run advertisements during their programming. In general, networks seek broader penetration from MVPDs (that is, carriage on tiers that reach more subscribers) because broader penetration increases their overall licensing and advertising revenue, and it also better positions the network to secure content from content

providers (who generally prefer that their content, such as a given sporting event, be broadcast on a network that reaches more viewers).

Comcast is a vertically integrated MVPD because its indirect parent company, Comcast Corporation, also owns television networks, including Versus and the Golf Channel. Comcast carries its affiliated Versus and Golf networks on its expanded basic tier. It initially carried the NFL Network on its less penetrated D2 tier and later moved the NFL Network to its even less penetrated sports tier.

B. NFL Network

The National Football League is the most popular sports league in the nation by a wide margin. More than 70 percent of Americans consider themselves football fans.[3] Football programming consistently draws high ratings, and the top-rated football programming regularly places amidst the highest-rated programs carried by any channel. This popularity is widely recognized:

The NFL Network is a popular network shown on cable, satellite, and telco systems that provides in-depth "Football 24/7" programming to fans of the nation's most popular sport.[5] During the last football season, the NFL Network offered 54 pre-season live and tape-

[3] Written Testimony of Frank Hawkins ¶ 12 (Apr. 4, 2009) [hereinafter Hawkins Testimony].

[4]

[5] Hawkins Testimony ¶ 4.

delayed football games, coverage of the NFL Scouting Combine and the NFL Draft, training camp coverage, and a variety of other football-oriented programming.[6]

During its short tenure, the NFL Network has enjoyed considerable success. Comcast's own expert has generated data showing how the NFL Network has outperformed other recently launched sports networks in obtaining broad carriage from networks other than Comcast.[7] The NFL Network also has received critical recognition, earning five Sports Emmy awards in its five-plus year history, including a 2007 Sports Emmy for *America's Game: The Super Bowl Champions*, a 40-episode original series.[8] More than 240 cable, satellite, and telco operators distribute the NFL Network to approximately 36 million subscribers nationwide.[9]

C. Comcast's Historic Carriage of the NFL Network

Comcast has carried the NFL Network on its cable systems since 2004, about a year after the Network's launch at the beginning of the 2003-2004 football season.[10] Until the events that gave rise to Enterprises' complaint, Comcast carried the NFL Network nationally on its broadly penetrated "D2" tier, which at that time numbered about 8.6 million households and which was expected to continue to expand.[11]

D. Versus, the Golf Channel, and the NFL Network

At the same time that the NFL Network was growing in popularity, Comcast Corporation was attempting to grow two of its own cable networks, Versus (previously known as

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[6] *Id.*

[7] Expert Report of Jonathan Orszag Fig. 1 (Mar. 13, 2009) [hereinafter Orszag Report].

[8] Hawkins Testimony ¶ 4.

[9] *Id.* at 6.

[10] *Id.* at 8.

[11] *Id.*

"Outdoor Life Network" or "OLN") and the Golf Channel.[12] Like the NFL Network, Versus and the Golf Channel are national sports networks. And, like the NFL Network, Versus and the Golf Channel primarily target men between the ages of 18 and 49.[13] Versus, the Golf Channel, and the NFL Network compete against each other for programming, advertising, and viewers.[14] For example, top national advertisers compare the NFL Network to Versus and the Golf Channel in determining how to place advertising orders.[15]

Comcast Corporation's executives admit that its sports channels are assisted by its cable distribution arm.

Despite special support and assistance from the nation's largest cable operator, Versus and the Golf Channel earn substantially lower ratings among their target demographics than the NFL Network.[18] Nevertheless, Comcast carries both of its affiliated networks (as well as the MLB Network) on its "analog expanded basic" programming tier, which is received by

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[12] Press Release, "Comcast Reports First Quarter 2007 Results" (April 26, 2007) (Enterprises Exh. 118).

[13] Hawkins Testimony ¶¶ 12.

[14] *Id.* ¶ 12; Report of Dr. Hal J. Singer, ¶ 2 (Mar. 6, 2009) [hereinafter Singer Report].

[15] Written Testimony of Ronald H. Furman ¶ 10 (April 3, 2009) [hereinafter Furman Testimony].

[16] {

[17]

[18] Nielsen Galaxy Explorer Versus, Golf Channel, and NFL Network Ratings Analysis (May 1, 2008) (Enterprises Exh. 137.).

nearly all of Comcast's 24.2 million subscribers, while it carries the NFL Network on a premium tier received by only about two million of Comcast's subscribers.[19]

E. The Eight-Game Package

In order to increase the popularity of its affiliated sports network, Comcast sought a license from the National Football League to telecast eight live regular-season League games (the "eight-game package") on Versus.[20] Adding the eight-game package to Versus would have substantially increased the value of Versus to Comcast, particularly in the form of revenues from Versus advertisers, licensing fees charged to other cable and satellite operators carrying Versus, and increased market capitalization of Comcast itself.[21]

In recognition of the significant value of the eight-game package for Versus, Comcast offered

in exchange for a license for the eight-game package.[23]

Mr. Roberts separately stated that acquisition of the eight-game package would increase Comcast Corporation's stock price significantly because (a) content companies traded in financial markets at higher multiples than distribution companies and (b) transitioning Comcast

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[19] *Id.*; Hawkins Testimony ¶ 3.

[20] Hawkins Testimony ¶ 18.

[21] *Id.*

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[23] Hawkins Testimony ¶ 18.

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Corporation into the role of a content company could increase the company's market capitalization by approximately [redacted].[25] Accordingly,

Comcast knew that the NFL Network might be awarded the eight-game package in its place, and so Comcast bolstered its efforts to secure the eight-game package with periodic "reminders" to the NFL that Comcast might tier the NFL Network if Comcast did not receive the eight-game package. Mr. Burke testified that Comcast "repeatedly pointed out in meetings and telephone conversations with representatives of the NFL that, if the NFL elected to add the games to [the NFL Network] rather than license the rights to [Versus], the [parties' agreements] would permit Comcast to choose the tier on which Comcast would offer the NFL Network to its customers."[27]

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[25] *See* Hawkins Testimony ¶ 18.

[26] [redacted]

[27] Declaration of Stephen B. Burke ¶ 14 (June 19, 2008) (attached as Exh. 1 to Comcast Answer) (Enterprises Exh. 138).

[28] [redacted]

[29] [redacted]

The NFL resisted these threats, though, awarding the eight-game package to the NFL Network and not to Versus.[31] Shortly after this award, Mr. Roberts told then-NFL Commissioner Paul Tagliabue that, as a result of the League's failure to license the eight-game package to Comcast for Versus, the League's "relationships with the cable industry are going to get very interesting."[32]

F. Comcast's Decision to Drop the NFL Network from the Digital Basic Tier

After Comcast failed to secure the eight-game package, it had the option of either (1) carrying the NFL Network without the eight-game package, on the same terms on which it had earlier carried the Network; or (2) carrying the NFL Network with the eight-game package and paying a surcharge.

In the next few months, Comcast then began planning to tier the NFL Network, even though it knew that the NFL Network would object to the tiering.

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31 Hawkins Testimony ¶ 21.

32 Written Testimony of Paul Tagliabue ¶ 3 (April 3, 2009) [hereinafter Tagliabue Testimony].

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On September 24, 2006, Comcast announced its plans to move the NFL Network to a premium sports tier, with penetration at that time of about 750,000 subscribers, rather than continue its carriage of the NFL Network on the "D2" tier. Comcast resolved to tier the NFL Network despite the improvement in the appeal of the NFL Network's programming schedule attributable to the addition of the eight-game package.

Enterprises promptly sought a declaratory judgment against Comcast in connection with that planned action because, in its view, the parties' affiliation agreement did not authorize Comcast to carry the NFL Network on the premium sports tier.[36] Although Comcast had claimed to hold the opposite reading of the parties' affiliation agreement, it balked at tiering when faced with the declaratory judgment lawsuit. However, following summary judgment by the trial court in Comcast's favor a year later, which was later reversed, Comcast notified Enterprises of its intent to implement its long-delayed tiering decision, requiring consumers to pay an additional fee of as much as $84 annually to continue to receive the channel on the sports tier.[37]

In June 2007, Comcast began dropping the NFL Network from the "D2" tier to the premium sports tier on all of its systems.[38] This action rapidly reduced the number of Comcast subscribers who received the NFL Network from approximately 8.6 million to about 750,000.[39] This was done only after Enterprises had added the eight-game package — a package

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[36] Hawkins Testimony ¶ 24.

[37] *Id.* ¶ 29; Declaration of Jeff Shell ¶ 9 (June 19, 2008); Complaint Exh. 24.

[38] Hawkins Testimony ¶ 26

[39] *Id. See also* Declaration of Madison Bond ¶ 14 (Exhibit 2 to Comcast Answer) (July 19, 2008) (Enterprises Exh. 139) (reporting that the sports tier had only "approximately 1.9 million" subscribers as of July 2008).

for which Comcast itself was willing to pay for carriage on Versus[40] — to the NFL Network's schedule.

G. Impact of Tiering

Comcast's witnesses have freely acknowledged that tiering a network severely impacts its competitive positioning.

Comcast's tiering has had precisely this impact on the NFL Network. First, because of Comcast's tiering decision, NFL Network has lost millions of dollars each month in licensing revenues.[42] Second, Comcast's tiering decision curtailed the NFL Network's subscriber reach so drastically that it undermined Enterprises' ability to compete for telecast rights of other programming. For example, the NFL Network's limited subscriber reach rendered unsuccessful Enterprises' bid for a package of Pac-10 and Big 12 Conference college football games.[43] This package of college football games was awarded to Versus.[44]

Third, several NFL Network advertisers, citing limited distribution of the Network, have cut NFL Network advertising or eliminated it entirely. These advertisers include companies such as .[45]

Fourth, the tiering decision has increased Enterprises' costs. Lower distribution and the loss of ad revenue forced Enterprises to spend more money on marketing. This has

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[42] Singer Report ¶ 48.

[43] Hawkins Testimony ¶ 31.

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[45] Furman Testimony ¶¶ 18-19; Hawkins Testimony ¶ 33.

reduced net revenues and limited Enterprises' ability to reduce license fees charged to distributors.[46]

H. Comcast's History of Abusing Its Power as a Vertically Integrated MVPD

Comcast's discriminatory actions toward the NFL Network do not represent the first time that Comcast has exploited its market power to stifle competition. For example, the Commission recently concluded that, in order to benefit its video-on-demand division, Comcast "selectively target[ed] and interfere[d] with connections of peer-to-peer (P2P) [video] applications" used by its Internet subscribers.[47] The Commission concluded that this constituted a "discriminatory and arbitrary practice [that] unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management."[48]

Comcast similarly has been accused of discrimination on several other occasions. It is presently being charged with discrimination by regional sports network MASN, and it previously agreed to favorable coverage for MASN in an earlier matter, after being ordered to submit to arbitration to resolve allegations of discrimination.

Even Comcast's lead expert, Jonathan Orszag, has noted Comcast's history of abusing its power as a vertically integrated distributor. Specifically, Mr. Orszag opined that Comcast's use of what he called a "loophole" in the consumer protection provisions of the 1992

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[46] Singer Report ¶ 56.

[47] *Formal Complaint of Free Press and Public Knowledge Against Comcast for Secretly Degrading Peer-to-Peer Applications*, Mem. Op. & Order, File No. EB-08-IH-1518, FCC 08-183, ¶ 1 (rel. Aug. 20, 2008) (Enterprises Exh. 183).

According to the Commission, "VOD . . . operates much like online video, where Internet users can select and download or stream any available program without a schedule and watch it any time, generally with the ability to fast-forward, rewind, or pause the programming." *Id.* ¶ 5 (quoting Comments of Free Press).

[48] *Id.* ¶ 1.

Cable Act (the same statute that includes Section 616) was a "telling example of the potential dangers associated with allowing programming exclusivity" in sports programming.[49] Using Comcast's behavior as a key example, Mr. Orszag concluded that "the fundamental motivation" for the exclusivity prohibitions in the Act "has not significantly changed" since Congress adopted it in 1992.[50] That is true, he concluded, because "cable firms are still dominant in the market" and because, "when allowed to do so, cable systems have demonstrated a willingness to engage in vertical foreclosure."[51]

I. FCC Complaint

Enterprises filed its Complaint and supporting documentation in this case on May 6, 2008. Soon after, the Media Bureau found "that [Enterprises] established a *prima facie* showing of a violation of the program carriage rules."[52] It also found "that the pleadings and supporting documentation present several factual disputes, such that [it was] unable to determine on the basis of the existing records whether [it could] grant relief based on these claims."[53] Accordingly, the Bureau designated three issues for hearing, and the Presiding Judge modified them as follows:[54]

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[49] *Id.* at 21.

[50] Jonathan M. Orszag, Peter M. Orszag, & John M. Gale, "An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators & Programmers," at 16, attachment to Comments of EchoStar Satellite Corp. & DIRECTV, Inc., CS Docket No. 01-290 (Jan. 2002) (Enterprises Exh. 77).

[51] *Id.* at 16, 31.

[52] Memorandum Opinion and Hearing Designation Order, *NFL Enters. LLC v. Comcast Commc'ns LLC*, MB Docket No. 08-214, File No. CSR-7876-P, ¶ 7 (Oct. 10, 2008) (Enterprises Exh. 184) [hereinafter *HDO*].

[53] *Id.*

[54] *Id.* ¶ 138.

1. whether the defendant engaged in conduct the effect of which is to unreasonably restrain the ability of the complainant to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by the complainant in violation of Section 76.1301(c);

2. whether the defendant has demanded a financial interest in the complainant's programming in exchange for carriage in violation of Section 76.1301(a); [and]

3. if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), or demanded a financial interest in the complainant's programming in exchange for carriage in violation of Section 76.1301(a), whether mandatory carriage of the complainant's programming on the defendant's system is necessary to remedy the violation(s) and, if so, the prices, terms, and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends.[55]

LEGAL STANDARD

A. Enterprises Has Established That Comcast Discriminated.

To establish discrimination, the Commission considers the following three factors:

1. Similarly Situated Networks: Whether the independent network is similarly situated with an affiliated network.[56] The Commission does not require that the two networks be "identical,"[57] but instead requires only that they compete with each other and have at least comparable popularity.[58]

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[55] Nov. 20, 2008 Order ¶ 8; Nov. 21, 2008 Erratum ¶¶ 2-3.

[56] *HDO* ¶ 75. *See also TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783 ¶¶ 27-28 (2008) (Enterprises Exh. 185) [hereinafter *TCR*]. Under the Commission's rules, "Except for the possibility of review, actions taken under delegated authority have the same force and effect as actions taken by the Commission"; such actions "shall be made, evidenced, and enforced in the same manner as actions of the Commission." 47 C.F.R. §§ 0.5(c), 0.203(b).

[57] *HDO* ¶ 75.

[58] *TCR* ¶¶ 27-28 (finding the Mid-Atlantic Sports Network, a regional sports network focused on Washington Nationals and Baltimore Orioles baseball games, similarly situated with News 14 Carolina, a regional news channel operated by Time Warner).

2. Different Treatment: Whether the similarly situated channels were treated differently.[59]

3. Harm to Competition: Whether the differential treatment harmed the independent network's ability to compete.[60] The complainant need not show that, "without carriage, [the complainant] cannot compete at all, *i.e.*, would exit the industry, operate at a loss, or suffer some similar major disadvantage."[61] Instead, it is sufficient to show that the differential treatment "restrained [the complainant's] ability to compete fairly for viewers, advertisers, and sports programming rights."[62]

The Media Bureau determined that Enterprises has made a *prima facie* showing that Comcast has discriminated against Enterprises in violation of Section 76.1301(c).

B. Enterprises Has Made a *Prima Facie* Showing That Comcast Required a Financial Interest in Programming.

Section 616 prohibits vertically integrated cable carriers from requiring a financial interest in programming as a condition of carriage. The Commission has confirmed that the statute "does not explicitly prohibit multichannel distributors from acquiring a financial interest or exclusive rights that are otherwise permissible," and thus, that "multichannel distributors [may] negotiate for, but not insist upon such benefits in exchange for carriage on their systems."[63] The Commission stated, however, that "ultimatums, intimidation, conduct that amounts to exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests or

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[59] *Id.* ¶ 29 (finding differential treatment where the affiliated network was carried on analog basic and the cable operator agreed to carry the independent network, if at all, only on digital basic); *HDO* ¶ 76.

[60] *Id.* ¶ 30; *HDO* ¶¶ 77-78.

[61] *TCR* ¶ 30.

[62] *Id.* ¶ 31.

[63] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution and Carriage*, 2d Report & Order, 9 FCC Rcd 2642, 2649 (1993) [hereinafter Second Report & Order] (Enterprises Exh. 181).

exclusivity rights for carriage, should be considered examples of behavior that violates the prohibitions set forth in Section 616."[64] In the *HDO*, the Media Bureau also determined that Enterprises has made a *prima facie* showing that Comcast violated the prohibition against requiring a financial interest in programming as a condition of carriage.

C. Comcast Now Has the Burden of Justifying Its Discriminatory Treatment of the NFL Network.

In program carriage cases, "the claimant must establish a *prima facie* case of discrimination [or requiring a financial interest] as defined by the . . . statute, at which point the burden shifts to the respondent to justify treatment of [the] non-affiliated programmer."[65] This standard is consistent with general principles of federal law under which a plaintiff's *prima facie* showing shifts the burden of proof to the defendant.[66] Therefore, the burden is on Comcast to rebut the presumption that it has violated Section 616.

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[64] *Id.*

[65] *TCR* ¶ 21 (upholding *Adelphia* arbitration decision and applying the FCC's program carriage legal standards) (quoting *Arbitration Between TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable Inc., Respondent*, Case No. 71 472 E 00697 07, Decision and Award (Jun. 2, 2008)). *See also id.* ¶¶ 32-41 (finding that the defendant "has failed to provide evidence sufficient to rebut [the complainant's] *prima facie* case").

[66] *See* 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5123.1 (3d ed. 2008); *Director, Office of Workers' Comp. Programs, Dept. of Labor v. Greenwich*, 512 U.S. 267, 280 (1994) ("[W]hen the party with the burden of persuasion establishes a prima facie case supported by credible and credited evidence, it must either be rebutted or accepted as true.") (quotations omitted); *Batson v. Kentucky*, 476 U.S 79, 94, 96 (1986) (holding that "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging ... jurors" within an arguably targeted class); *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (concluding that the implementation of a redistricting plan for state legislative districts with population deviations over 10% creates a *prima facie* case of discrimination under the Equal Protection Clause, thus shifting the burden to the State to defend the plan); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973) (stating that proof of state-imposed segregation in a substantial portion of a school district will support a *prima facie* finding of a system-wide violation, thereby shifting the burden (continued...)

Yet even if Enterprises, rather than Comcast, had the burden of proof at this stage, it would be satisfied easily. Enterprises will offer indisputable evidence of discrimination and of Comcast's requiring a financial interest in violation of Section 616; and it will demonstrate that Comcast's efforts to justify its abusive conduct have no merit.

ARGUMENT

Comcast violated Section 616 by discriminating against the NFL Network on the basis of affiliation, which restrained the Network's ability to compete fairly. In addition, Comcast violated Section 616 by requiring a financial interest in programming — the NFL eight-game package — as a condition of carriage.

I. COMCAST DISCRIMINATED AGAINST ENTERPRISES IN VIOLATION OF 47 C.F.R. § 76.1301(c).

A. The NFL Network Is Similarly Situated With Versus and the Golf Channel.

Comcast owns two national sports networks, Versus and the Golf Channel, that compete against the NFL Network. All three are national sports networks[67] that target substantially the same advertisers and viewers.[68] The NFL Network and Versus both offer live sports coverage, sports news, highlights, and similar sports programming. The two channels even have competed directly for college football game rights in addition to the eight-game package of League games.[69]

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to school authorities to show that current segregation is not caused by past intentional discrimination).

[67] *See* Singer Report ¶ 30.

[68] Written Testimony of Dr. Hal A. Singer ¶ 2 (April 6, 2009) [hereinafter Singer Testimony]; Furman Testimony ¶ 10.

[69] Hawkins Testimony ¶ 31.